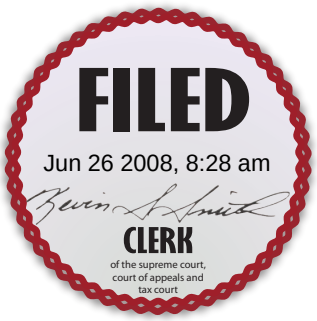

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IN THE COURT OF APPEALS OF INDIANA

PAUL FOX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0710-CR-595
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-0611-FC-217029

June 26, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Paul Fox was convicted in Marion Superior Court of Class C felony intimidation, Class D felony dealing in a sawed-off shotgun, Class D felony pointing a firearm, and Class D felony criminal recklessness. Upon appeal, Fox claims that the evidence is insufficient to support his conviction for intimidation and that there was a fatal variance between the pleading and proof. We affirm.

Facts and Procedural History

On November 11, 2006, Indianapolis Police Officers Craney and Barbieri responded to a report of a disturbance at a house on North Gray Street in Indianapolis. By the time Officer Barbieri arrived at the scene, Officer Craney was speaking with a woman on the front porch of the house about the disturbance. Officer Barbieri noticed that a car was parked on the sidewalk in front of the house, which was in violation of a local ordinance. Officer Barbieri did a computer check of the license plate on the car and discovered that the car belonged to defendant Fox, who had also been reported as being involved with the disturbance being investigated. Officer Craney attempted to speak with Fox, who was inside the house, but got no response. Officer Barbieri then decided to issue a citation for the improperly parked car and requested a truck to tow the car.

Robert Quarles, a tow-truck driver, came to the scene in response to the police request. Officer Barbieri handed Mr. Quarles a copy of the citation and the "tow slip" and instructed him to tow Fox's car away. Tr. p. 16. As Mr. Quarles began to connect the car to the tow truck, Fox appeared at a second-story window. Fox was very agitated and began to verbally threaten Mr. Quarles. Fox stated that he wanted to do both Officer Barbieri and Mr. Quarles harm, and made threats that he had "something" for them. Tr.

p. 17. Fox also told Officer Barbieri that if he wanted to find out what that was, then he should come to Fox's front door. Mr. Quarles heard Fox talking to Officer Barbieri and looked up to see Fox pointing the barrel of a shotgun downward out of the window. Mr. Quarles heard Fox say something along the lines of, "[L]eave the car alone," or "I have something for you two." Tr. p. 28. Mr. Quarles testified that he felt that the barrel was pointed at him. Alarmed, Mr. Quarles yelled at the police that Fox had a gun. Officer Barbieri looked at the window in time to see Fox pulling the barrel of the shotgun back inside the window.

Officer Barbieri called for assistance, and the police attempted to talk Fox into coming out of the house. When that failed, a SWAT team was eventually called to the scene. The police obtained a warrant, and the SWAT team entered the house and apprehended Fox. The police also found a sawed-off shotgun in the house.

On November 15, 2006, the State charged Fox with Class C felony intimidation, Class D felony dealing in a sawed-off shotgun, Class D felony pointing a firearm, Class D felony criminal recklessness, and Class A misdemeanor battery. The battery charge was later dismissed. A bench trial was held on June 22, 2007, at the conclusion of which the trial court found Fox guilty of the remaining four charges.

At a hearing held on August 24, 2007, the trial court sentenced Fox to four years for intimidation, with two years suspended, and a concurrent 180-days term for dealing in a sawed-off shotgun. The trial court found that the other two counts "merged," and did not enter judgments of conviction thereon. Fox filed a motion to correct error on

September 17, 2007, which the trial court denied on September 27, 2007. Fox now appeals.

Discussion and Decision

Fox first claims that the State failed to present evidence sufficient to support his conviction for Class C felony intimidation. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. Instead, we consider only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

To convict Fox of intimidation as charged, the State had to establish that Fox communicated a threat to Mr. Quarles with the intent that Mr. Quarles engage in conduct against his will. See Ind. Code § 35-45-2-1(a)(1) (2004 & Supp. 2007).[1] A "threat" is defined to include "an expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person, or damage property." I.C. § 35-45-2-1(c)(1).

Fox first claims that the evidence was "conflicting" with regard to whether he appeared at the window with a shotgun, noting that he specifically denied having done so. This is immaterial. Upon appeal, we consider only the evidence *supporting* the

[1] Intimidation is a Class A misdemeanor, which is elevated to a Class D felony if the threat communicated is a threat "to commit a forcible felony." I.C. § 35-45-2-1(b)(1)(A).

conviction. The trial court, as the trier-of-fact, was free to disbelieve Fox's self-serving testimony and instead believe the testimony of the police and Mr. Quarles that Fox pointed a gun out of the window and threatened both the police and Mr. Quarles.

In Johnson v. State, 743 N.E.2d 755, 757 (Ind. 2001), the evidence established that the defendant displayed a firearm, made two obscene remarks, and told the victim "don't even think it." Our supreme court held that this was sufficient evidence that the defendant had communicated a threat within the meaning of the intimidation statute. Id. Here, Fox not only displayed a firearm, there was evidence that he pointed it at the tow-truck driver. Even if he did not point the shotgun directly at anyone, Fox at the very least pointed the gun out the window as he told the police and the driver that he "had something" for them and told the driver to leave his car alone. From this, the trial court could reasonably conclude that Fox communicated a threat to Mr. Quarles.

Fox also claims that the State failed to prove that he intended Mr. Quarles to engage in conduct which was against Mr. Quarles's will. The State alleged that Fox acted "with the intent that Robert Quarles engage in conduct against his will, to wit: that Robert Quarles refrain from towing a vehicle that belonged to . . . Fox." Appellant's App. p. 117. Fox now claims that the State failed to prove that it was the will of Mr. Quarles to tow the car. Fox claims that, as an employee of a tow-truck company, Mr. Quarles was simply acting under the will of the State, who was the party that wanted the truck towed. We agree with the State that this argument, while novel, is not persuasive.

Under the circumstances present in this case, the trial court could reasonably infer that Mr. Quarles, whose job it was to tow cars and who had been instructed by the police

to tow Fox's car, wanted to tow the car away. Indeed, Mr. Quarles testified that it was his duty as a tow-truck driver to "do police impounds." Tr. p. 26. The trial court could also reasonably conclude that Fox, by pointing a shotgun at Mr. Quarles and threatening him to "leave the car alone," intended Mr. Quarles to engage in conduct against his will, i.e., not tow the car away as was his job. To hold otherwise would mean that a defendant could never be convicted of threatening an employee unless there was direct evidence that it was the employee's own, personal will to do his job. We decline to impose such a requirement. The evidence was sufficient to support Fox's conviction for intimidation.

Fox also claims that there was a fatal variance between the pleading and the proof presented at trial. A variance is an essential difference between proof and pleading. Hall v. State, 791 N.E.2d 257, 261 (Ind. Ct. App. 2003). However, not all variances require reversal. Id. A variance is deemed "fatal" only if the defendant is misled by the charge in the preparation and maintenance of his defense and if he was harmed or prejudiced thereby. Childers v. State, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004).

Here, Fox does not claim, and our review of the record does not reveal, that he objected to this variance at trial. As a general rule, the failure to make a specific objection at trial waives any material variance issue. Hall, 791 N.E.2d at 261. Waiver notwithstanding, Fox fails to explain how he was mislead or otherwise prejudiced by the variance, other than to repeat his unsuccessful claim that the evidence was insufficient to support his conviction for intimidation.

Fox also briefly claims that the State "failed to charge" him under subsection (a)(2) of the intimidation statute. This subsection provides that "[a] person who

communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act . . . commits intimidation." I.C. § 35-45-2-1(a)(2). Fox argues that, based upon Mr. Quarles's testimony, the trial court might have inferred that Fox's actions would have been in retaliation for Mr. Quarles's attempt to tow his vehicle, i.e. that Fox committed intimidation as defined under subsection (a)(2), rather than under subsection (a)(1) as charged.

The fact that the State *could* have charged Fox under subsection (a)(2) of the intimidation statute is irrelevant. The State instead chose to charge him under subsection (a)(1). To the extent that Fox argues that the trial court mistakenly convicted him under the wrong subsection, he provides no support for this suggestion. We presume that trial courts know and follow the applicable law. Thurman v. State, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). There is no indication that the trial court here did anything other than find Fox guilty of intimidation as charged under subsection (a)(1) of the intimidation statute, and the evidence was sufficient to support this conviction.

Affirmed.

MAY, J., and VAIDIK, J., concur.